EXACTIONS AND SUBDIVISIONS:
METHODS AND REQUIREMENTS RELATED TO DEVELOPER PARTICIPATION TOWARD THE COSTS OF PUBLIC IMPROVEMENTS

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I. INTRODUCTION. Since the beginning of time, humans have congregated together and formed families, tribes, villages, communes, and finally great cities. In all of that history one thing has consistently been true; those that arrive later in time benefit from the efforts of those that arrived earlier, and those that arrived earlier need to get over it. So sums up the conflict that surrounds the topic of this paper.

Although the above paragraph is tongue in cheek, it is nevertheless not far from the mark. The development and redevelopment of cities from the perspective of a government official responsible for the care and management of a city and its citizens is a never ending and constant struggle to provide and maintain the essential services needed by the community. Police and fire protection, water, light, centralized sewer, drainage, transportation and recreation among many other services. For example, a city develops a traffic or roadway plan, builds new roads which temporarily meet the needs of the community, but which also makes new areas within the city accessible and ripe for new development. Development occurs and chokes the roads and the cycle starts all over again. Is it not then fair to ask a developer to contribute toward the costs associated with new roads needed to offset the impact caused by such development? The developer's perspective is not without empathy towards the challenges of the city but their interests are primarily financial, they have to be able to sell a product that is competitive within their market and they incur a great deal of financial risk just in funding necessary infrastructure internal to their development. The developer is content to take care of the trees he has in front of him and let the city worry about the forests.

However, this conflict between public and private interests is a conflict that occupies a fairly large gray area. Reasonable minds will agree that new development and sometimes redevelopment have an impact on existing infrastructure and services within a city and that a developer should be responsible for the costs that become necessary by virtue of the development. Reasonable minds can become quite unreasonable when actual costs are being determined. When it's the government that crosses the line, a taking of private property can occur.

Both the Texas and the U.S. Constitutions provide that private property shall not be taken

for a public purpose without compensation.[1] When a governmental entity uses private property for a public purpose, "thus forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"[2] a taking of private property occurs. Takings occur primarily in one of three different ways: (i) by physical taking[3], (ii) by regulatory taking, and (iii) by exactions. Physical takings are self-explanatory; a physical occupation occurs. Regulatory takings occur when an ordinance or other requirement interferes with the investment expectation of the land owner in such a way as to interfere with legitimate private property interests. An exaction is considered a taking if the land owner is required as a condition to getting a permit or some other land use approval or condition to dedicate property or expend funds for a public purpose unrelated or insufficiently related to the impact caused by the development.[4]

The law surrounding "exactions" or "rough proportionality" is the law which attempts to find the appropriate balance between a new development's impact on infrastructure in a community and the financial contribution that should be exacted from the developer by reason of that impact. Generally speaking it is the impact that occurs "off-site" from the property being developed as opposed to the internal requirements of the development. Both case law and statutory law are relevant to the inquiry and when cities implement rough proportionality ordinances and thereby require a financial or other contributions from a developer both the statutes and the cases should be consulted to avoid a possible taking. But also to ensure that the developer is paying its fair share toward the impact the development will have on previous funded public improvements.

II. FEDERAL CASES OF IMPORTANCE.

"The protection of private property in the Fifth Amendment . . . provides that it shall not be taken . . . without compensation. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears.[5]"

A. *Nollan v. Cal. Coastal Comm'n,* 483 U.S. 825; 107 S.Ct. 3141 (1987). Property owners brought action against California Coastal Commission seeking writ of mandate. The Commission had imposed as a condition to approval of a building permit that the owners provide a public access easement across their property. The Superior Court, Ventura County, granted peremptory writ of mandate, and the Commission appealed. The California Court of Appeal, (177 Cal.App.3d 719, 223 Cal. Rptr. 28), reversed and remanded with directions. Appeal was taken to the Supreme Court. The Supreme Court, Justice Scalia, held that the Commission could not, without paying compensation, condition a building permit on the property owners' transfer of a public easement across beachfront property.

The Supreme Court opined that although the outright taking of an uncompensated, permanent, public-access easement would violate the Takings Clause, conditioning appellants' rebuilding permit on their granting such an easement would be a lawful land-use regulation if it substantially furthered governmental purposes that would justify denial of the permit. The government's power to forbid particular land uses in order to advance some legitimate police-power purpose includes the power to condition such use upon some concession by the owner,

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